

BOOK REVIEWS

- *Collected Papers of Paul Vinogradoff*. With a Memoir by the Right Hon. H. A. L. Fisher. New York, Oxford University Press, 1928. Vol. I—Historical. pp. viii, 326. Vol. II—Jurisprudence. pp. viii, 509. 42s.

We owe these *disjecta membra* of a life filled with what Mr. Fisher aptly calls one of "cyclopean toil" to the devotion of Lady Vinogradoff. It is a worthy tribute to the memory of her distinguished husband. No doubt various papers are now brought together which in this age of much printing would have escaped the diligence even of the interested expert. Among the forty-six papers here collected, two of them (one on Church law and the other on Sources) were intended as chapters of a third volume of the author's *Outlines of Historical Jurisprudence* and lack his final supervision. Another paper entitled *Some Problems of Anglo-Norman Legal History* is an address delivered to the *Société d'Histoire du Droit* at Paris in December, 1925, a few days before his death. As Professor Joüon des Longrais, the editor of this paper, remarks, it was doubtless the last thing Vinogradoff wrote. It should be pointed out that this collection of papers represents but a small fraction of the author's writings, and even if we except from consideration his book publications, a large fraction would still remain. In the list of his publications are entered 266 items. In addition to this formidable enumeration there are prefaces to eight volumes of *Oxford Studies* and numerous public and private lectures. Vinogradoff's first publication appeared in the year 1876. He died in his seventy-first year. Such in briefest outline is the literary monument of fifty years of productive scholarship.

The memoir by Right Hon. H. A. L. Fisher which introduces these volumes is deserving of high praise. It is a biographic statement which leads up from Vinogradoff's birth at Kostroma in Russia in 1854 to his sudden death in Paris in 1925. The numerous intervening facts are woven together with consummate skill and these facts are treated with a masterful competence. By its charm of composition the memoir conceals the extensive learning and much of the labor necessary for its production. Convention requires that a testimonial of this kind be friendly, but this memorial reaches that end without effusion and it never leaves the path of good taste and sound judgment. It is a brilliant preliminary to the technical aridities that follow.

Vinogradoff was accomplished in many things. He was linguist, philologist, economist, lawyer, jurist, governmentalist, sociographer, historian, musician, and much besides. There was a time when a man might reach first rank in several specialities. Thus, da Vinci was painter, sculptor, musician, architect, engineer, scientist, and mechanician. Goethe was lawyer, soldier, scientist, philosopher, poet, dramatist, theatre director, and, emphatically, much besides. To speak, however, of more recent times, we find Kohler who was engineer, lawyer, jurist, poet, musician, etc. So great has become the specialization of knowledge that it is unlikely that a man in this age can reach the highest competence in more than one field or be more than a dilettante in any field if his energies are divided. The gift of common sense, which Vinogradoff more than once has emphasized, will carry one very far but hardly far enough to master various diverse and intricate specialities. The labels, economist, lawyer, jurist, etc., cover enormous stretches of knowledge and each of them must be more or less minutely divided to make possible any genuine specialism unless there can

be found a short-cut to take the place of the quantum of human energy necessary to master any science. Vinogradoff possessed the key. It was not simply that he was very industrious, or that his mental and physical equipment were finely adjusted—these factors are essential—but he was able to get what was necessary with a minimum of effort because he had the language access to the world's accumulated stores of knowledge which must be mastered in any science. We believe this is the explanation of his breadth of interests and of his writings.

In middle life, Vinogradoff already had a reading knowledge of at least a dozen languages, and in Russian, English, French, German, Italian, and Norse he could "speak and write with force and distinction." These precisely are the leading languages of art, science, history, and philosophy. Vinogradoff could take at first hand what for the average man can only be known at second hand or with laborious difficulty or not at all. And yet with his powerful equipment of classical and modern languages, it can hardly be said that Vinogradoff had attained unquestioned primacy in more than one field. This one field was medieval agrarian economics and social organization. Here undoubtedly he had no superior, whether the comparison be limited to England or whether it be extended to comparative law. In this field his word was the most potent that could be spoken by any living man.

He did not confine himself to the antiquities of the land system or to kinship structures. His activities naturally extended to the details of early English legal history but here a comparable intellect was the monarch of a kingdom. That ruler was Maitland, Downing Professor at Cambridge (1888-1906).

It was but another step to an abstract history of legal ideas. That step gave us chiefly the *Outlines of Historical Jurisprudence* (1920-22), the last of his large works, in two published volumes, which unfortunately was not completed. A collateral activity led to another field of research which may be described by the term, theoretical jurisprudence, to which much of the second volume of this collection is devoted. These four departments—medieval economics, legal history, historical jurisprudence, and theoretical jurisprudence—are the ones that chiefly concern our profession. There was much writing and effort on questions of pure political science, Russian politics, education, general history, and sociology, which do not enter into the present discussion, however important may be these activities in themselves and in disclosing the wide compass of Vinogradoff's interests. His urge to create was so insistent and his information so extensive that they could not be bounded by any demands of specialism. It is understandable, too, how accident plays a large part in matters of this kind. Because of his great fame throughout all of Europe and America, Vinogradoff was constantly under pressure for one purpose and another to draw upon his rich stores of knowledge and no doubt his generous nature led him into many unreckoned academic ventures that would of necessity disturb any creative program that he may have formulated. But, because of the diffusion of effort in many directions, he was led by a boundless curiosity and a restless energy to enter into fields of science, where, though he might be a superior among superiors, yet he must submit to the *iudicium parium suorum*. The same observation must be made for any scholar great or little. This is not criticism but only explanation. While we believe there is a distinct difference in the merit of Vinogradoff's historical writing in comparison with his excursions into certain fields of jurisprudence and also a difference in quality in the period antedating his profound disappointment in the turn of political affairs in Russia as against the few remaining years that followed, yet everywhere we see the operation of a well

balanced judgment. For example, in his discussion of so-called juridical persons, we do not find him following the extreme view of Gierke and Maitland and of many others that corporations are real beings nor do we find him swinging to the other extreme of saying that a corporation cannot be chargeable for pecuniary damages arising out of malice. Again, in his discussion of the nature of the State, we find Vinogradoff taking a moderate position between such extremes as those of Hobbes and Duguit.

Vinogradoff had the true mark of the scholar—he always went to the original sources. It is rare that he used a translation of anything. He not only employed the original sources but he invariably made use, not of the most convenient, but of the best editions. Vinogradoff was not much interested in mere verbal distinctions nor did he seem concerned about mere words. He could speak of the king taking the “hook,” which might be well enough at Hampstead but would be shocking at Oxford. He could also take the Frisian name of Jhering (Yair-ing), whose works he knew from end to end, and write it in English as E-a-ring (Ihering). Verbal errors which had sunk their roots into a language did not disturb him. He was more concerned about the substance of things. His training in the critical method of dealing with historical materials was carried over into those researches that do not have a basis in cartularies, court rolls, chirographa, and other archival documents. When, therefore, he ventured into realms somewhat apart, he wrote with impressive competence even if not always with genuine originality.

We have already suggested several important qualities, traits, and methods that would account for Vinogradoff's literary fertility and scientific distinction—sound common sense, a critical approach to all evidence, intellectual curiosity, and matchless familiarity with the literature of legal science in all European languages. But there is something further and perhaps not less important than these endowments, given or acquired. He was also the favorite of the gods. In 1883 he came to England for the first time to make studies in history for the purposes of a doctoral thesis. In 1884 he published a letter announcing his discovery of Bracton's notebook. The complete story is well known. It was an astonishing fact that a foreigner could after a few month's residence in England, put his hands on and identify a manuscript of such great historical interest. This brilliant discovery led to two very important consequences. About three years later, Maitland published his famous edition of the Notebook (1887). This discovery led finally to Vinogradoff's appointment (1903) to the Corpus chair at Oxford. In a word, this historical accident was the starting point of a very remarkable legal-historical renaissance in England, culminating in the recent nine-volume edition of Holdsworth's *History of English Law*. The startling discovery of the Veronese *palimpsest codex* of Gaius in 1816, first by Haubold, and again, by Niebuhr, had important concrete results for the exposition of Roman law, but the discovery of Bracton's notebook affected not so much the exposition of early English law as that it put in motion a great wave of learned researches which have led to a revolutionary reconstruction of English legal history on a new basis of rigid criticism.

While the two volumes are labeled respectively *History*, and *Jurisprudence*, yet the labels are not to be taken seriously. There is much in them that is neither history nor jurisprudence in any accurate sense, and in the jurisprudence volume there are several papers—especially among the ones in German—that clearly belong to the history volume. Speaking generally, and with allowance for some exceptions on both sides of the ledger, the history papers impress us more than the jurisprudence papers. In the history division, the writer carries with him the impedimenta of a conquer-

ing general. In the jurisprudence papers, the writer hardly even rises above a gentlemanly competence. The latter papers lack thematic novelty, unrelieved by such contrapuntal devices as Maitland, for example, would have introduced, or such melodic variations as Maine would have employed. These latter papers are simply unimaginative and heavy reflections of a great scholar who somewhat late in life had come into contact with a series of questions which long before he had learned to answer. It will not be possible within the limit of a book review to consider in detail the forty-odd papers now collected. A few words emphasizing the foreign language papers for the information of the general reader must suffice.

The paper on the Text of Bracton, already well known to most of the readers of this Journal, dealing with the edition of Sir Travers Twiss, was a devastating one. It still puts fear into the heart of any man who undertakes any translation of anything, and especially of any antiquity—and who in academic circles has not sinned? As is well known, the practical effect of this repudiation of the Twiss edition has been the beginning in recent years of a critical edition of Bracton by Woodbine. The next paper on Folkland annihilates a theory supported by twenty-one experts—among them Stubbs, Pollock, Maur, and Brunner. Folkland was *ager privatus*. The paper on Buchland is demonstrated to have a Roman origin arising out of *privilegia* and developed in ecclesiastical law. The paper on *Praxis der Englischen Staatseinrichtungen* is a treatment of the same matters discussed in Anson's Law and Custom. It shows how in England, in administrative matters, the need of democracy is adjusted to the requirement of stability and enlightenment in government. The paper on *Freie Rechtsprechung* is a rather venturesome attempt to show how Athenian democracy solved the problem of *richtiges Recht*. *Geschlecht und Verwandtschaft* is an examination of the Norwegian kinship system. It is directed to an attack on unscientific generalization in the evolution of legal ideas and "*die Luftgebilde der wissenschaftlichen Konstruktion*." "All history is a flow of development and it does not submit to rigid forms." The concrete findings of this essay are in part repeated in the Outlines. This study shows the sound historical instinct of the scholar in this, that Norway has been less affected by infiltrations of foreign stocks than any other part of Europe. The attempt to explain the survival of matrilineal residues in the *Germania* by assuming the possibility of a slave class which carried the custom forward would be less likely to affect the Norse situation where the influence of diffusion was outward rather than inward. *Wergeld und Stand* is an examination of the views of Heck, Wittich, Mayer, Seeböhm ("Tribal Custom"), and Brunner on medieval social organization. It shows how the rating of social classes was affected by the Roman monetary system, and also the variations among the various German stocks. The paper, *Les Maximes dans l'ancien droit commun anglais*, is an interesting and valuable account of how the Roman sources entered into the making of our law in the early centuries. "*Quelques problèmes d'histoire du droit anglo-normand*" presents a theory to account for what Maitland called a revolution, in the second half of the twelfth century, from Anglo-Saxon or Anglo-Danish customs to Anglo-Norman law. He proposes that the interests and ideas of the military class were the decisive factor of the sudden change.

These essays are not for the general reader. They are written by a specialist for the specialist and are to be appraised on that basis. It would have been possible for Lady Vinogradoff, out of the large amount of available material, to have made a collection of Sir Paul's writings with a much wider appeal to our profession. As suggestions of what was feasible, we point to the eight articles written in 1910 for the Encyclopædia

Britannica, some of the articles written in 1911 for the Reallexikon (Strassburg), the articles (1917) in Hasting's Encyclopædia, various book prefaces, book reviews of a monographic nature, and various addresses. The first volume of the present collection contains several examples of the type of article which can be read without too much demand on the readers' familiarity with the offensive technicalisms of history or jurisprudence. Yet if one may speculate on the matter, we venture to believe that Vinogradoff himself would have preferred the sort of chrestomathy now published. His knowledge of historical matters was so sharply defined that it could not, unless thinned out, as for example in his *Common Sense in Law*, sink deeply into the mentality of the bonus vir.

We believe Mr. Fisher is entirely right in saying that Vinogradoff "ranks high among the intellectual athletes of history" and that "if a list be made of those who . . . have rendered illustrious service" to the advancement of the critical departments of law "the name of Vinogradoff must be inscribed upon it." This will be true for his researches in history, if it extends no farther. Historical research can rarely furnish a sensation. Physical science, mathematics (*e.g.*, Riemann), philosophy (*e.g.*, Bergson), linguistics (*e.g.*, Champollion), and other fields may bring new ideas which must be noticed in the superficial commonplaces of polite conversation, but historical research will not once in a century emerge from its monkish cell to warm the hearts of men or to garnish the warmed-over cabbage, the *crambe repetita*, of table talk.

Vinogradoff does not show himself as an expositor in these papers but rather as a discovering historian. He never moves very far from concrete facts. His *Outlines of Historical Jurisprudence* will not make the popular appeal of *Ancient Law* simply because the critical method does not tolerate the perils of a *luftgebildende Konstruktion* involved in all generalizations. The *Outlines* are not world-embracing syntheses of legal evolution but a series of monographic studies comparable to the *Etudes d'histoire du droit* of Dareste, confined to concrete historical data. This method if long used will profoundly affect the writer's point of view no less than his literary style. It may be here observed that there is a covenant of perpetual hostility sealed by nature between the historian and the analytical jurist. The historian must have his phenomena in motion. The analytical jurist puts his data in a rigid frame of reference. The two attitudes cannot be easily reconciled. Vinogradoff, therefore, will long be remembered as a historian when his promenades in the analytical field will be forgotten.

We have already noticed the differences in the researches in history as against other fields (*e.g.*, art, science, philosophy). The nature of historical work, therefore, is such that only rarely, if ever, can any man be a path-breaker in a large sense. He must work minutely with numerous details, the discovery of which has only a narrow influence on other facts. Vinogradoff's fame will not survive because of an epochal reconstruction with significant external effects, although in his studies of villeinage and of the manor and in other directions his labors are of very great importance to the historian either in altering a view embracing a wide range of historical facts or in detail. Vinogradoff has set many things right in legal and social history but he will be longest remembered as a powerful catalytic force which decomposed many historical errors and produced changes of the highest importance in the whole field of historical research, especially as applied to law in England. The extent of this influence upon Maitland and many others is immeasurable. He well deserved to be one of that great triumvirate at Oxford which included Maine and Pollock.

Northwestern University

ALBERT KOCOUREK.

Real Covenants and Other Interests Which "Run With Land." Including Licenses, Easements, Profits, Equitable Restrictions and Rents. By Charles E. Clark. Chicago, Callaghan & Company, 1929. pp. xxv, 201. \$3.50.

From the dry-as-dust repetition of the average text and from the detailed exposition of the exhaustive treatise it is refreshing to turn to a work like this, reasoned and readable, short enough to be interesting but long enough to cover the subject. Much of the matter has already appeared in print in the form of law review articles, the chapter on Licenses dating back to the Columbia Law Review of December 1921, that on The Running of Real Covenants to the Yale Law Journal of December 1922 and the chapter on Party Wall Agreements as Real Covenants to the Harvard Law Review of January 1924. The remaining chapters have appeared in the current Yale Law Journal or are new. Additions have been made to the chapters of earlier date, especially to the more controversial chapter on the Running of Real Covenants.

The interests considered in this volume are those non-possessory interests in or attached to land commonly treated under the head of "rights in the land of another" or "incorporeal hereditaments." "Many of the incorporeal hereditaments listed by Blackstone (2 Commentaries, Ch. III), such as advowsons, corodies, officers, tithes and dignities which are unknown or of no importance in this country" are omitted while covenants and equitable restrictions, which are not listed by Blackstone, are included. Thus interests presenting similar problems are grouped whatever their common-law classification.

The long list of incorporeal hereditaments enumerated by Blackstone shows that whatever difficulty the medieval common law may have had in conceiving of the transfer of a right without the transfer of a thing, it had no difficulty in conceiving of non-possessory interests as things and therefore transferable.¹ Whatever conception the medieval common law started from, therefore, it allowed a wealth of property interests in land that has been the despair of the modern searcher for free trade in land in England. A large part of these interests were non-possessory but if one "had" such an interest he could transfer it. If it had been divested he no longer "had" it and it could not be transferred. To use the language of the later law, a chose in action was not transferable but the fact that an interest was non-possessory did not make it a chose in action.

Perhaps the best example of the extremes to which the medieval common law went in recognizing non-possessory property interests in land was in the case of rent. The most common kind of rent was of course feudal and after the Statute of Quia Emptores feudal rent became something that had existed time out of mind and ceased to be the matter of express agreement but rent service might still arise by express agreement where the transfer was not in fee simple and rents charge and rents sec were still possible on a transfer of the fee simple notwithstanding the statute. Obligations of the most diverse character were included under the conception of rent. These obligations—or such they would seem to us—ran with the land and ordinarily were incident to some interest in land though they might be detached and exist in gross. So far did the medieval common law carry the idea that these non-possessory interests were really in the nature of property interests that it extended to them the benefit of the possessory actions and, as it was chary of its actions, denied them in general the action of covenant. This anomalous treatment

¹ See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 124-149.

of rent makes it understandable how in a world where interests, which seem to us properly obligations attached to and running with land, played a large part, the notion of covenants running and attached to land should have so largely disappeared that notwithstanding the early cases of actions on covenants given by Professor Clark and notwithstanding *Pakenham's Case*, the preamble of 32 HEN. viii, c. 34 could be taken to mean that at common law covenants did not run with the land. As said by Lord Justice Lindley in denying the running of the burden of a covenant with the fee, one who knew his law could have accomplished the same thing by means of a rent charge.² The running of covenants in the Middle Ages, therefore, does not have to be explained by analogy to express warranties. What has to be explained is that the running of such covenants disappeared to the extent that it did. Professor Clark has rendered a great service in showing how little basis there is for letting the old law of warranties affect the general law today as to covenants running with the land.

Another service that Professor Clark has performed has been to free the law from the bondage of Lord Kenyon's dictum in *Webb v. Russell*³ that for a covenant to run there must be privity of estate between the covenantor and covenantee. This dictum is apparently without foundation in the English case law and was a misreading of the rules as to collateral covenants and as to covenants with a stranger to the title. The real difficulty as to privity of estate in the case was as between the mortgagor, the covenantee, and the one holding under the mortgagee. Lord Kenyon was a lawyer of very narrow training who was inclined to go off half-cocked and this dictum would seem to have been a consequence of that tendency. Whatever reason there may be for confining the running of covenants to such as are contained in conveyances, that reason would not obtain in *Webb v. Russell* for the covenant there was contained in what at least purported to be a lease.

The discarding of false analogies as to warranties and of the dictum of Lord Kenyon in *Webb v. Russell* is not of itself of great importance but becomes such as incidental to the elimination of "false notions of history" that "have hampered the development of a consistent modern doctrine." It is this "consistent modern doctrine" that is Professor Clark's aim. Such a doctrine is worked out with surprising clarity and convincingness and ought to have great weight in any future consideration of the matter. Privity of estate as a requirement of the running of covenants with land is confined to "succession to the estate of one of the parties to the covenant." Privity of estate as meaning "succession of estate also between covenantor and covenantee" or as meaning "mutual and simultaneous interests of the parties in the same land" is eliminated.

The same clarity and convincingness that mark Professor Clark's treatment of covenants running with the land characterize his treatment of other topics such as the doctrine of *Wood v. Leadbitter*,⁴ the assignability of easements in gross, and many others too numerous to mention. The sterility of much of the legal thinking in this country has no better illustration than the docility with which *Wood v. Leadbitter* was followed until an English court overruled it.⁵

Such a work as this of Professor Clark shows what a modern, progressive statement of the common law can be. It is the sort of thing that judges and lawyers can look to for help when they most need it.

Iowa College of Law

PERCY BORDWELL.

² *Austerberry v. Oldham*, [1885] 29 Ch. D. 750.

³ 3 T. R. 393 (1789).

⁴ 13 M. & W. 838 (1845).

⁵ *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K. B. 1.

The Court of Appeals of Maryland, A History. By Carroll T. Bond. Baltimore, Barton-Gillet Co., 1928. pp. iii, 214.

This book is the result of a most careful and exhaustive study of all the judicial records of Maryland courts in the custody of the Maryland Court of Appeals, as well as all contemporary illustrative literature and comment.

The work was prepared primarily for the Maryland bar, on the occasion of the 150th Anniversary of the Court as organized under the State Government, and therefore it is of peculiar interest and importance to Maryland lawyers. It has, however, a much wider interest than this purely local one, because the organization and early practice of the Maryland Court of Appeals was substantially the same as that of all English-speaking courts of those times.

The court, established in the seventeenth century, was a reproduction of the jurisdiction of Parliament in error, long established in England and surviving these now in the appellate jurisdiction of the House of Lords. Its history is the history of an English institution transplanted to American soil, and developing from its administration by country gentlemen or planters into a modern tribunal manned by efficient and effective lawyers and held in high esteem throughout the country.

The make-up of the book is thoroughly good. The style is concise and exact. There are many half-tone reproductions of old records and interesting portraits and pictures.

The author has just been awarded the degree of LL.D. by Johns Hopkins University, which is a tribute both to the excellence of this work and to the pre-eminence his legal and judicial career have won for him.
Annapolis, Maryland

ALBERT C. RITCHIE.

To The Pure. A Study of Obscenity and the Censor. By Morris L. Ernst and William Seagle. New York, The Viking Press, 1928. pp. xiv, 336. \$3.

The "Boston Book Party of 1927," which caused the suppression of Dreiser's *An American Tragedy*, Lewis' *Elmer Gantry*, Sinclair's *Oil* and almost every other book of literary value in that year, raises the question considered in the above book, of the "necessity for a revaluation of obscenity." Theories of censorship based on "philosophies of infant damnation and salvation by ignorance" make little appeal to one's rationality. The difficulty of legislation lies in the fact that obscenity is subjective, and a determination depends upon the effect of material on hypothetical, unknown persons; that determination is to be made by jurors, schooled neither in literature, history or psychology. "Uncertainty has converted these laws into whips against new ideas." At one period the taboo was religion, then the state. Today it is sex. And, while the law has ordinarily been interpreted as prohibiting material which will excite lust or lascivious imagination, yet today it is used to suppress knowledge of sex and its manifestations. The play, *The Captive*, was suppressed because of its theme. The same applies to the recent condemnation of *The Well of Loneliness*. Mary Ware Dennett's pamphlet on *Sex* provides too much information. Knowledge is a dangerous thing—in Boston and New York as well as in Tennessee.

The authors point out the absurd implications of modern prudery. If the effect on the immature and weak-minded is the test, then the literary diet of normal adults is limited to the innocuous standard of childhood and senility. Quoting from court decisions, the authors make the following

inquiries: "Is the author's reputation a factor?" "Does a brilliant style overcome the obscene?" "Is immorality moral if delicately conveyed?" "Is obscenity related to high price or scarcity of sales?" "Does a long book, in solid type and unillustrated, gain immunity?" "Do bored readers lend protection?" What is obscenity anyhow? Have the age of the reader, the period of publication, the customs of the people, anything to do with it?

Out of the welter of absurdity and contradiction in the attempted application of these laws, one point emerges clearly: that in this field of the law, criminal statutes are enforced which are so indefinite that a citizen might easily "guess" himself into jail, in spite of the requirement of the Fourteenth Amendment of the Federal Constitution that criminal statutes must be so explicit as to avoid that possibility.¹ An indefinite criminal statute offends the "due process" clause unless it is general, uniform, fixed and certain. It violates the old maxim that "when the law is uncertain, there is no law." It is equivalent to the Chinese code which prescribes punishment for "improper conduct."

The searching analysis of this book, the conscientious research and the effective argument make clear the folly of present legislation and judicial pronouncement. One may still feel that in the present state of society a line must be drawn somewhere against pornographic matter, but the inclination would be to draw it far to the left, and to ban only that which practically all men agree is obscene. Where there is doubt, immunity is the better solution. As with all repressive legislation, the evil does not lie so much in the mischief of particular prosecutions, as in the timidity and fear (as well as curiosity) aroused by social and legal taboos.

New York

ARTHUR GARFIELD HAYS.

A History of Italian Law. By Carlo Calisse. Translated by Layton B. Register. With Introductions by Frederick P. Walton and Hessel E. Yntema. Boston, Little, Brown & Co., 1928. pp. lix, 827. \$7.

It was the original plan of the editorial committee that this volume devoted to Italy should treat all five of the usual divisions of European law—public, civil, criminal, procedural, and commercial. It is therefore natural that her law is scarcely mentioned in the volume on continental criminal law, and little more noticed in that on criminal procedure; yet this is unfortunate (and the greater attention paid to her civil procedure, in the volume on that subject, correspondingly fortunate), for in Calisse's work procedure is only discussed incidentally to the history of the substantive law, civil and criminal, although Italy is the classic land of penal theories. Nor is there any treatment whatever of the commercial law, in which her medieval eminence was equally notable. Whatever the merits of the volume in the fields covered, it is therefore necessarily somewhat disappointing.

Its contents reflect the study of law as conducted in European schools. Aside from a highly technical treatment of portions of constitutional law, our own schools have done little with the public law, unless criminal law be so classified and regarded as an exception. American readers will not be converted to new practices by an examination of Calisse's work. As here given it consists of three books on public, criminal, and private law. Although the first is only an abstract it receives 215 pages, as compared with 273 and 309 devoted to the other topics; and despite the skill of Mr. Register's drastic abbreviations, it hardly realizes the editorial committee's plan of providing "a helpful background" to the other books.

¹ *United States v. Armstrong*, 265 Fed. 683 (D. Ind. 1920).

More than two-thirds of the discussion of the period up to 1100 are occupied with details—dealing with changes in territorial divisions, in the names and powers of administrative officers (Roman, Lombard, Frankish, and ecclesiastical), and in the relation between civil and military power; with the economic and legal origins and vicissitudes of social classes, and with the organization of the army and finances—whose connection is not shown (if indeed any existed) with the legal institutes developed in the other books. For the remaining third, devoted to the administration of justice, —and revealing the legal relations between the Romans and their conquerors and the influence of the Church—a reader must be grateful. This is not to say, of course, that the other matter has not an independent excellence: the discussion of feudalism, for example, is admirably clear, and that of the varying fortunes of the submerged Roman population is of exceeding interest.

In some other respects, also, the work leaves one dissatisfied. Very little attention is given to developments since 1789; less than 35 pages being devoted to the public and criminal law of this period (11 specially written by the author and, particularly, Mr. Register for this edition), and less than 13 to the history of the private law since Italian unification, all specially written by Professor Calisse for this edition. The developments in public law before 1100 receive almost twice as much space as those of the following centuries to 1789; and in the treatment of criminal law the space allowance to the earlier period somewhat predominates. Although the topical arrangement of the matter on private law makes a similarly definite comparison impossible, it may be said that the only period in which source citations are abundant is the Germanic. In every book the treatment of the Neo-Roman epoch (after 1100) is relatively very sketchy. The abundance and the overwhelming importance of its legislation is clearly indicated (p. 351), but one learns nothing of it aside from occasional vague references to "statutes of the medieval cities", "the reforms and legislation of the 1700's," and the like, despite the existence of abundant studies on the medieval ordinances. Book III, though essentially only a student's manual, citing liberally parallel discussions in other textbooks, is a model historical analysis of a national law. Its citations to sources are, however, scant and perfunctory. Even those for the Germanic period are frequently unsatisfying. Six passages in Tacitus, for example, are the sole authority given for a dozen fundamental generalizations upon early Germanic law and society.

However much one may lament over what the work does not contain, every reader must admire the unusual clarity of its organization and expression. Appreciation is here due equally to Mr. Register, who, as already indicated, is not merely a translator but a collaborator with the author. His abridgment of Book I is so carefully done and smoothly adjusted that it reads without suggestions of omission or irregular transitions; he has added not merely valuable portions of the text, but also various notes clarifying (occasionally correcting) the text and offering additional guides to the reader.

Taking the three books together they offer a most interesting view of the interaction of Roman, Germanic, and Canon law.

The author's attitude toward feudalism seems curiously unreflective. He pronounces it "the most genuine expression of the Germanic as contrasted with the Roman ideal" (p. 116); at the same time he exhibits its disordering effect upon the judicial organization (p. 81), the vitality it lent to private vengeance (p. 91), the manner in which it confined the civil and criminal jurisdiction of the state (p. 95), and credits to it the conception that judicial functions were a property right (p. 81). Yet despite these

and other similar judgments one also finds statements, of the conventional type, that Italian institutions emerged in the Neo-Roman period "rejuvenated" and "invigorated." Are not such traditional judgments underlaid by naïve assumptions respecting races? So far as regards feudalism much can be said for the thesis that it was a calamity. How much can be said for the proposition that it was a benefit, or rejuvenated or invigorated anything that was desirable? To what other Germanic contributions—if not to "race" or feudalism—did Calisse attribute the rejuvenation which he asserts? A reader seeks the answer in vain.

The influence of the Church, great and beneficent, is abundantly illustrated. It saw the sin in crimes; displacing purely objective tests (which Calisse considers characteristically Germanic) by considerations of intent which necessarily altered theories of the purpose of punishment, tending to establish the theory of reform rather than the political end (which Calisse regards as essentially Roman) of securing tranquility by penalties sufficient to deter the criminal—notwithstanding its early favor to corporal punishment (p. 412) and its use of excommunication (p. 311). It made to social order transcendent contributions. It humanized in many ways the family law. It introduced the will. On the other hand, there were evils. As imperial authority decayed and the people rallied to the church it became increasingly a political institution, and one ultimate result of its union with the State, which turned into crimes theological heresies of scientific inquiry ("the temporal laws were in every particular an echo of the penalties of popes and councils"), was the horrors of the Inquisition—so well revealed in Sir John Macdonell's recent book on Historical Trials.

The influence of the Roman law is similarly illustrated.

A long list would be needed to indicate passages or sections admirable for clarity or remarkable for suggestiveness. Any writer so inclined as Calisse to philosophic thinking is bound to leave undeveloped many generalizations provocative of thought. Such are those just indicated regarding Germanic and Roman elements in the criminal law. But there are many others: for example, the suggestion that the substitutional remedy of damages is peculiarly Germanic (p. 356), that insistence upon compensation dominated early Germanic views of causation (p. 261). Dozens of passages, too, arouse reflections upon our present law: when, for example, one reads of early Germanic apportionments of negligence (p. 224); of law which illumines the borderline between theft and conversion (pp. 341, 345, 445); of medieval recidivists (p. 384); of talonic penalties (pp. 336, 415), infinitely less ridiculous than most of our present fines; or laws diminishing civil capacity or lowering social status—both, of course run head-on into present dogmas of democracy—in punishment of offences like perjury which forfeited public confidence (p. 525); of laws which took account of social status—as in protecting peasants "as more likely to commit crime through error or ignorance" (p. 364), and in aggravating the offences of which defendants of higher social rank were guilty (pp. 368, 370, 371). These may suffice as examples.

Every volume in the series has been similarly stimulating, but not all in equal measure. This volume is the last. For it, and every other one, at least the law-school teacher is duly thankful.

University of Pennsylvania

FRANCIS S. PHILBRICK.

The Development of International Law. By Sir Geoffrey Butler and Simon Maccoby. New York, Longmans, Green & Co., 1923. pp. xxxv, 566. \$9.

Though this book is the product of the joint labors of Professor Butler and his former pupil, Simon Maccoby, the actual writing of the text was

done by Professor Butler, and for the sake of convenience he alone will be referred to as "the author."

The most striking feature of this work is the method of treatment—quite the most effective which has yet been employed in dealing with the subject. Believing that the changes in international law have been the reflection of changes in the political theory and practice of states, the author has divided his work into three major periods—the Age of the Prince, the Age of the Judge, and the Age of the Concert. In each period the major changes and developments are traced with an unusual sense of the important and with admirable clarity and simplicity. The author rarely ventures a conclusion or an opinion, but when he does it usually reveals a strong sense of reality, and a thorough knowledge of the meaning of history. The compactness of the work reveals the immense amount of labor which must have been expended in its preparation.

To the American reader the large portion of the work which deals with the development of the rules of land and sea warfare must have a special significance. Here it must be noted that the author has treated the subject with an historical objectivity not always to be found in the numerous post-war articles and works which have dealt with the subject. The author is careful to warn the international lawyer to avoid the pitfalls of logic into which so many have fallen since the war. History and logic must often clash, and when they do, logic must give way or disaster will follow. Nowhere is this more clearly illustrated than in the so-called "developments" of the rules of war during 1914-1918. "Changed conditions" are said to have necessitated developments in these rules, enlarging the rights of belligerents and virtually destroying those of non-combatants and neutrals. Logically the argument is correct, historically it is false. The virtual abolition of the distinction between combatants and non-combatants is one of the most dangerous of the so-called developments mentioned. It utterly ignores the historical development of the rules protecting the non-combatant, and follows bare and cruel logic to its unfortunate extreme. This vital distinction was based on considerations of morality and humanity and followed a developing sense of civilized action. The force of the distinction grew as civilization grew, bringing with its growth a gradual amelioration of the cruelties and inhumanities of war. That non-combatants contribute largely to sustaining the armies in the fields is nothing new; it has been so for centuries. The distinction is, and always has been, arbitrary, not logical, and to apply logic to the subject at this late day is to cast aside the lessons of history and the dictates of humanity, and to return to barbarism.

Likewise, to the reader who follows Professor Butler's developments of the rules of sea warfare, it becomes apparent that the claimed changes here are equally false. Few seem to realize the danger of the blows struck at international law and the property rights of neutrals and individuals by the notorious British Orders in Council during the World War. They wiped out the distinction between contraband, conditional contraband and exempted goods. They extended the right of search even beyond the days of the privateers, and ignored entirely the meaning of "blockade." These changes may perhaps be defended in logic, but viewed historically, their illegality is irrefutable. In time of war the rights of belligerents and neutrals are, and always have been, diametrically opposed. The rules governing the right of the opposing parties in international law were based, not on logic, but in compromise. These rules, evolved and fixed by mutual concession, which was the only way they could be fixed, are as valid today as in 1914. The conflict of interest which gave rise to these rules is as great today as ever, and neither the conflict nor the rules may be erased by syllogisms.

That third of the volume dealing with the Age of the Concert will probably be of less vital concern to the American reader, yet it is an extremely interesting account of the political and economic development of Europe during the past century. America is by no means neglected, and the author has viewed events on this side of the Atlantic with considerable shrewdness and insight.

Mechanically, the volume leaves something to be desired. There is no bibliography and the notes are placed at the end of the chapters. The many reviewers who have called attention to this inconvenient and annoying practice of placing the notes at the end of chapters seem to have made much less headway in England than in America. The index is excellent, the proof reading almost perfect, and the physical make-up does credit to the publishers.

Based on a wide knowledge of history, filtered through an objective and realistic brain, this book must take its place as one of the most valuable contributions to the history of international law yet made.

Houston, Texas

JOHN P. BULLINGTON.

Law and Theory of Railway Demurrage Charges. By Harleigh H. Hartman. New York, Traffic Publishing Co., 1928. pp. vi, 220. \$5.

This is a convenient handbook dealing, as the author states in his preface, with "the salient features of the theory, law and practice" in railway demurrage matters, and "does not purport to be an exhaustive treatise on this branch of the law." The gradual development of railway demurrage based on analogy to demurrage under the maritime law, is briefly outlined; the nature of the charge and the right of a railway to collect it, is explained.

The remainder of the text, insofar as it deals with demurrage, sketches briefly the jurisdiction of the Interstate Commerce Commission over, and the requirements of the Interstate Commerce Act with respect to, its assessment and collection in connection with interstate commerce. All statements are supported by extensive quotation from, and citation of, decisions of the courts and the Interstate Commerce Commission. The book affords a readable and convenient introduction to a subject which affords some of the knottiest problems arising under railway tariffs.

The last three chapters of the book deal with reciprocal demurrage, penalty charges akin to demurrage, and application of the demurrage rule to short line connections. The first of these is a purely academic discussion, as such demurrage does not exist in connection with interstate commerce. It is applied in very few instances in connection with intrastate commerce.

The heading of the last chapter is somewhat misleading. The chapter deals primarily with the Per Diem Code which is not a code of demurrage rules. The author states that the purpose of the Per Diem Code is to secure the prompt return of cars to the owning carrier and that the per diem charge is not intended to represent the rental value of a car. These statements are erroneous.

The per diem charge is based on the average daily cost of owning and maintaining a car and, as stated in a quotation made by the author at page eight of his text from *New York Hay Exchange v. Pennsylvania Railroad Company*, 14 I. C. C. 178, 184 (1908), may be taken as fairly representing the value of the use of a freight car.

Per diem has been said to be "in the nature of a penalty" but its primary purpose is to afford the carrier owning a car adequate compensation from another carrier using that car. The prompt return of cars to their owners

is brought about by the Car Service Rules, which have been adopted by mutual agreement by the members of the American Railway Association. But for those rules, one carrier, as long as it had use in revenue service for cars belonging to another, would have no incentive to return them to the owner.

The author cites numerous Conference Rulings of the Interstate Commerce Commission as authority. These rulings, unless incorporated in formal decisions of the Commission, are of no force as they have recently been rescinded.

New Haven, Connecticut

W. W. MEYER.

Principles of Sociology. By Rudolph M. Binder. New York, Prentice-Hall, Inc., 1928. pp. xvi, 609. \$5.

Perilous is the course of the man who would make a synthesis of extant knowledge of anthropology, psychology, endocrinology, economics, sociology, philosophy, and the various specialized branches of human relations. Such a synthesis may be the ultimate desideratum of some "sociologists"; at present, however, few of the component branches of this all-embracing would-be science have reached the dignity and the accuracy which justify the use of the word "science" as a definition of their discipline. Any attempt, therefore, at the writing of this definitive sociology is foredoomed to failure. Professor Binder's *Principles of Sociology* undertakes an herculean task, and fails bravely and worthily.

The initial principle of sociology is taken to be this: namely, "that the individual seeks completion and finds it only through interaction with his social environment; the give-and-take relation alone can turn his various capacities into abilities, useful to himself and to society." In this statement the author defines his field, and it concerns the individual more than it does the society. For him "sociology" would be rather the study of the individual in his social relationships, and the effect of social customs and phenomena upon the individual, than the study of the social customs and phenomena themselves. This emphasis upon the individual is patent throughout the whole work:

"[The individual] seeks his own completion. In this search lie all the possibilities of achievement and of tragedy. For, his completion is impossible without others, and here lie the fundamental aspects of all social life. He may achieve or fail not only because he strives, or fails to strive, but because the society in which his lot is cast is favorable or unfavorable to the development of his uniqueness. In either case, his fate is bound up with the society in which he lives, and the mere expansion of his biological needs, if nothing else, holds him there. He is a social animal by sheer necessity."

Individuals, then, are classified and reclassified, biologically, psychologically, economically, and in many other fashions. There are vitality, mentality, morality, and sociality classes; endocrine classes; thymic individuals; thyroid individuals—not to mention the racial, age, and other social classes.

Professor Binder writes cogently and well. But the net result of his work is the impression of a series of essays all having some bearing upon sociology, rather than of an authoritative description of society and its institutions. He hales before him various theories, such as that of the effect of the geographic environment on human beings, or that of instincts, or that of "consciousness of kind," or that of Nordic supremacy, and by his incisive criticism shows their weaknesses and their strength; he presents succinct accounts of the various glands and their functions, and of the differentiation of man into races; he even describes in simple, com-

prehensible terms the main social institutions, and some of the more important practical social problems. But after having read the book, will the layman, or the student, have a clear idea of the evolution of social institutions, such as marriage and the family, government, religion, and the like? These are the *sine qua non* for the student of society, whether lawyer, statesman, social worker, or sociologist; and to them the author devotes only one-fifth of his book.

For the rest, Part I, though labelled The Social Population, is concerned, after an introductory discussion of the composition of the population, with the uniqueness of the individual; so also is Part II, Social Motives. Part III, The Social Processes, is a fatally superficial series of essays on such topics as Domination, Toleration, Social Values, and The Socially Incomplete. Here the author forsakes his high standards of induction and scientific treatment, and, like too many other sociologists, spins his theories and illustrates them. The final section of the book, on Social Aims, is weak when it discusses Social Progress, and strong when Improvement of Health and The Integration of Social Activities are examined.

There is much sage judgment and penetrating analysis of social phenomena in the pages of this latest Principles of Sociology. But by its attempt to bridge the gaps between psychology and the various social sciences, it has succeeded only in falling into the abyss wherein lie countless other textbooks on sociology.

Yale University

JAMES G. LEYBURN.

REVIEWERS IN THIS ISSUE

Albert Kocourek is a Professor at Northwestern University Law School. He is the author of *JURAL RELATIONS*, reviewed in (1929) 38 YALE L. J. 402.

Percy Bordwell is Dean of the University of Iowa College of Law. He is the author of *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 1, 179.

Albert C. Ritchie is Governor of Maryland.

Arthur Garfield Hays is a member of the New York bar, and has been actively engaged in the Civil Liberties cases.

Francis S. Philbrick is a Visiting Professor at the University of Pennsylvania Law School.

John P. Bullington is a member of the Texas Bar. He is the author of numerous articles on International Law.

W. W. Meyer is Commerce Counsel for the New York, New Haven and Hartford Railroad.

James G. Leyburn is an Instructor in the Department of Sociology, Yale University.